

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1518-CR

Cir. Ct. No. 2012CF5535

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL OSHAY THOMAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: J. D. WATTS, Judge. *Affirmed.*

Before Kessler, Brennan and Brash, JJ.

¶1 PER CURIAM. Michael Oshay Thomas appeals a judgment of conviction, following a jury trial, of being a felon in possession of a firearm. Thomas also appeals the order denying his motion for postconviction

relief. Thomas contends that the trial court erroneously denied his motion to suppress evidence. We affirm.

BACKGROUND

¶2 On November 7, 2012, Thomas was charged with one count of being a felon in possession of a firearm. According to the criminal complaint, on November 4, 2012, Milwaukee police officers Joseph Scheuring and Jesse Benitez¹ conducted a traffic stop of a gray van parked more than twelve inches from the curb in a City of Milwaukee neighborhood, in violation of WIS. STAT. § 346.54(1)(d) (2013-14).² When the officers asked the occupants, including Thomas, the driver, to step out of the vehicle, they noticed the front passenger toss a magazine clip with unspent rounds on the floor of the vehicle. The officers recovered the magazine along with two additional loaded magazine clips and a pistol. The occupants were subsequently arrested and charged accordingly. Thomas filed a motion to suppress the evidence, arguing that the evidence was recovered as a result of an illegal stop. Specifically, Thomas argued that the officers lacked reasonable suspicion to stop Thomas's vehicle.

¶3 At the suppression hearing, both officers testified. Benitez testified that on the night of November 7, 2012, he was patrolling a high-crime area in the City of Milwaukee when he noticed a gray van with Louisiana license plates parked more than twelve inches from the curb. Benitez's partner, Scheuring,

¹ The criminal complaint refers to Benitez as Jesse Benitez, whereas the transcript of the motion hearing refers to the officer as Jeffrey Benitez. Because the complaint and the briefs refer to the officer as Jesse Benitez, we do the same.

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

activated the police lights. Benitez made contact with Thomas, the driver, and asked for identification. Benitez collected Thomas's identification, while Scheuring collected identification from the other passengers. The officers discovered outstanding arrest warrants for the two passengers in the backseat. Those occupants were placed under arrest, while Thomas and the front seat passenger remained in the vehicle.

¶4 Scheuring testified that after the two rear passengers were placed under arrest, he walked back to the van and explained to Thomas why those passengers were arrested. Scheuring asked Thomas for permission to search the backseat, where the arrested passengers were seated, but Thomas refused. The officers then asked Thomas and the front seat passenger to exit the vehicle. Benitez told Scheuring that he witnessed the passenger attempt to discard a magazine clip. The officers searched the vehicle and saw the discarded magazine clip between the driver's seat and the front passenger's seat. Scheuring then asked Thomas whether there was a weapon in the van. Thomas admitted that there was a firearm under the driver's seat, that he was a felon, and that he did not have a concealed carry permit. The officers found the firearm under the driver's seat.

¶5 The trial court found that the officers had sufficient probable cause to stop the vehicle because the van was illegally parked. The court also found that the officers properly searched the vehicle. This appeal follows.

DISCUSSION

¶6 On appeal, Thomas contends that the officers lacked reasonable suspicion to stop his vehicle based on a non-criminal traffic offense, and that the "prolonged stop of Thomas' vehicle to conduct an illegal search was unconstitutional." (Capitalization omitted.)

¶7 When reviewing a motion to suppress, we apply a two-step analysis. *See State v. Dubose*, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. First, we review the trial court’s findings of facts under the clearly erroneous standard, *see State v. Smiter*, 2011 WI App 15, ¶9, 331 Wis. 2d 431, 793 N.W.2d 920 (2010), with the trial court acting as the ultimate arbiter of witness credibility, *see Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Second, “we must review independently the application of relevant constitutional principles to those facts.” *See Dubose*, 285 Wis. 2d 143, ¶16.

¶8 An officer must have reasonable suspicion that a traffic law has been or is being violated to justify a traffic stop. *State v. Houghton*, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143. Reasonable suspicion depends on an officer’s ability “to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *State v. Richardson*, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990). An officer may conduct an investigatory stop of a vehicle based on a noncriminal traffic violation. *State v. Colstad*, 2003 WI App 25, ¶¶11, 13, 260 Wis. 2d 406, 659 N.W.2d 394.

¶9 What constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable officer reasonably suspect in light of his or her training and experience. *Id.*, ¶8. Courts must look to the totality of the circumstances when determining whether reasonable suspicion existed. *State v. Waldner*, 206 Wis. 2d 51, 58, 556 N.W.2d 681 (1996). Reasonable suspicion is evaluated under an objective test. *Id.* at 55-56. Although an inchoate, unparticularized suspicion or hunch will not suffice, *id.* at 56, when an officer observes lawful but suspicious conduct he or she has the right to temporarily detain the individual for the purpose of inquiry if a reasonable

inference of unlawful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn. *Id.* at 60.

¶10 Whether there was reasonable suspicion to conduct a traffic stop is a question of constitutional fact. *State v. Popke*, 2009 WI 37, ¶10, 317 Wis. 2d 118, 765 N.W.2d 569. In reviewing the trial court’s ruling on a motion to suppress evidence, we will uphold its findings of historical fact unless they are clearly erroneous. See *State v. Arias*, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748. Whether those facts satisfy the constitutional requirement of reasonableness is a question of law that we review *de novo*. See *Waldner*, 206 Wis. 2d at 54.

Police Had Reasonable Suspicion to Stop Thomas’s Vehicle.

¶11 Thomas contends that the officers lacked reasonable suspicion to stop his vehicle because the penalty for his parking violation “is strictly a forfeiture,” and is therefore neither a traffic violation, nor a criminal violation. The entirety of Thomas’s argument rests on our unpublished decision, *State v. Iverson*, No. 2014AP515, unpublished slip op. (WI App Oct. 9, 2014), in which we concluded that officers lacked reasonable suspicion to stop a vehicle after observing the driver throw a cigarette butt out of his window because littering was neither a criminal, nor a traffic offense. See *id.*, ¶¶1, 3, 9, 10. After Thomas filed an appeal in this matter, however, the Wisconsin Supreme Court reversed our holding. See *State v. Iverson*, 2015 WI 101, 365 Wis. 2d 302, 871 N.W.2d 661. The *Iverson* court concluded that “traffic stops to enforce civil forfeiture laws [are not] per se unconstitutional, even when those laws are not technically ‘traffic regulations.’” *Id.*, ¶54.

¶12 Here, the officers initially approached Thomas’s vehicle based on Thomas’s violation of WIS. STAT. § 346.54, which requires vehicles parked on the

street to be within twelve inches of the curb. Scheuring stated that he was certain the vehicle was illegally parked because his shoes, which measure thirteen inches or more, “easily” fit between the wheel of the van and the curb. Thomas does not actually dispute that he was illegally parked; indeed, he practically admits that he was illegally parked by arguing that his violation was punishable by forfeiture and not subject to a traffic stop. Accordingly, we conclude that the officers had reasonable suspicion to stop Thomas’s vehicle based on a violation of WIS. STAT. § 346.54.

The Stop Was Not Unreasonably Prolonged, Nor Was the Search Illegal.

¶13 Thomas also contends that once the rear passengers were arrested and secured in the squad car, “the officers should have been well aware that they were not permitted to conduct a search incident to arrest for officer safety.” He argues that the officers unnecessarily prolonged the stop because at that point, the officers had already 1) obtained the identification from all the occupants, 2) ran computer checks on all four of them, and 3) arrested two of them for outstanding warrants.” We disagree.

¶14 The Fourth Amendment of the United States Constitution protects the right of individuals against unreasonable searches and seizures. U.S. Const., amend. IV. Wisconsin courts “consistently follow[] the United States Supreme Court’s interpretation of the search and seizure provision of the fourth amendment in construing the same provision of the state constitution.” *State v. Kiper*, 193 Wis. 2d 69, 80, 532 N.W.2d 698 (1995) (citation omitted). We judge police officers’ actions against a standard of reasonableness, which “depends ‘on a balance between the public interest and the individual’s right to personal security

free from arbitrary interference by law officers.” See *State v. Malone*, 2004 WI 108, ¶21, 274 Wis. 2d 540, 683 N.W.2d 1 (citation omitted).

¶15 A traffic stop’s acceptable duration is determined by the “mission” of the seizure. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). If an officer becomes aware of additional suspicious factors during a valid traffic stop, and those factors are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the stop, the stop may be extended and a new investigation may begin. *Colstad*, 260 Wis. 2d 406, ¶19. The validity of the extension is evaluated under the same criteria as the initial stop. *Id.*

¶16 The issue therefore is whether there were articulable facts which would cause a reasonable police officer to suspect that criminal activity was afoot. See *Waldner*, 206 Wis. 2d at 55-56. When determining whether reasonable suspicion exists, we consider the totality of the circumstances. See *State v. Williams*, 2001 WI 21, ¶22, 241 Wis. 2d 631, 623 N.W.2d 106. This inquiry must necessarily take into account both the quantity and the quality of the suspicious factors. *Id.*

¶17 In this case, the “mission” of the seizure changed in accordance with the circumstances. As stated, when the officers initially stopped Thomas’s vehicle, they did so based on the reasonable suspicion that a parking violation had occurred. Upon obtaining identification from the passengers, a common police practice, the officers discovered warrants for the two rear passengers. Following their arrest, the officers sought permission to search the rear of the vehicle. Although Thomas refused to consent to a search, the officers lawfully asked Thomas and his passenger to exit the vehicle. See *Pennsylvania v. Mimms*,

434 U.S. 106, 111 (1977) (officers may ask occupants to exit the vehicle and wait on the side of the road rather than converse in the street for safety reasons). Benitez then witnessed the passenger attempt to discard a magazine clip. Benitez stated that he became concerned a firearm may be in the vehicle. At that point, the “mission” of the seizure changed to officer safety. Upon exiting the vehicle, Thomas admitted that he had a firearm in the car, was a felon, and that he did not have a concealed carry permit.

¶18 Under the totality of the circumstances, the officers did not unconstitutionally prolong Thomas’s seizure, nor did they conduct an illegal search of the car. Given the illegal manner in which the car was parked, the outstanding arrest warrants for half of the vehicle’s occupants, the passenger’s attempt to discard a magazine clip, and Thomas’s ultimate admission that a firearm was in the car, the officers acted lawfully. Accordingly, the trial court properly denied Thomas’s motion to suppress evidence.

¶19 For the foregoing reasons, we affirm the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

